IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

DANA COOPER, individually and On behalf of all others similarly Situated,	)	
Plaintiff,	)	
vs.	)	Case No. 4:16-cv-01293-DGK
INTEGRITY HOME CARE, INC.,	)	
Defendant.	)	

DEFENDANT'S SUGGESTIONS IN SUPPORT OF ITS MOTION TO DISMISS

COMES NOW defendant, Integrity Home Care, Inc. ("Integrity"), and respectfully offers its Suggestions in Support of its Motion to Dismiss Plaintiff's Amended Complaint. Plaintiff Dana Cooper ("plaintiff") was an exempt companionship services employee under the Fair Labor Standards Act ("FLSA") during all periods of time during which she was not paid overtime compensation. Plaintiff was never entitled to overtime under the FLSA as a matter of law, and her Amended Complaint must be dismissed under FED.R.CIV.P. 12(b)(6).

Respectfully submitted,

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TABLE OF CONTENTS

Table of Authorities ii

I. Factual Background and Allegations 1

II. Standard When Ruling on a Rule 12(b)(6) Motion to Dismiss 2

III. Argument 3

A. Plaintiff was an exempt employee under the companionship services exemption 3

B. The third-party regulation and companionship exemption withstood, without interruption, all challenges presented by the DOL and private parties through, at a minimum, November 12, 2015 5

C. Integrity's pay practices were always in full compliance with the FLSA and the DOL's written rules 7

D. The new regulations cannot be given retroactive effect 8

E. Dismissal is required as the Amended Complaint is without merit due to an absence of law to support a valid claim 14

IV. Conclusion 15

TABLE OF AUTHORITIES

Cases

Action on Smoking and Hlth. v. Civil Aeronautics Bd., 713 F.2d 795 (D.C. Cir. 1983) 6
Alves v. Affiliated Home Care¸ 2017 WL 511836 (S.D. N.Y. 2017) 13
Ashcroft v. Iqbal, 556 U.S. 662 (2009)... 2
Assoc. Indem. Corp v. Small, 2007 WL 844773 (W.D. Mo. 2007)... 3
Bachynskyy v. Holder, 668 F.3d 412 (7th Cir. 2011) 9
Bangoy v. Total Homecare Soln., LLC¸ 2015 WL 12672727 (S.D. Ohio 2015)............................ 10, 11
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).. 2
Bennett v. New Jersey, 470 U.S. 632 (1985) 9
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)... 8
Camreta v. Green, 563 U.S. 692 (2011)... 10
Citizens for Better Forestry. v. USDA, 2007 WL 1970096 (N.D. Cal. 2007) 5
Conley v. Gibson, 355 U.S. 41 (1957).. 2
Coopersmith v. Supreme Court, State of Colorado, 465 F. 2d 993 (10th Cir. 1972)............................ 3
Criger v. Becton, 902 F.2d 1348 (8th Cir. 1990).. 9
Cummings v. Bost, 2016 WL 6514103 (W.D. Ark. 2016).. 11
De Vegvar v. Gillilland, 228 F.2d 640 (D.C. Cir. 1955) 6
Dillow v. Home Care Network¸ *2017 WL 749196 (S.D. Ohio 2017)* 10-13
Durable Mfg. Co. v. U.S. DOL, 578 F.3d 497 (7th Cir. 2009) 9
Erickson v. Horing, 2001 WL 1640142 (D. Minn. 2001) 3
Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2000)... 14
Flamer v. Maxim Hlthcare. Serv., Inc., 2015 WL 12762067 (D. Md. 2015)....................................... 11
Gregory v. Dillard's, Inc., 565 F.3d 464 (8th Cir. 2009) 2
Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) 10, 12
Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015).. 6, 14
Home Care Ass'n of Am. v. Weil, 76 F.Supp.3d 138 (D.D.C. 2014) 5
In Re Keuler, 399 B.R. 782 (M.D. Pa. 2009) 9
Jordan v. Pugh, 2007 WL 2908931 (D. Colo. 2007) 6
Kinkead v. Humana, Inc., 2016 WL 3950737 (D. Conn. 2016)... 11
Kinzenbaw v. Deere & Co., 1980 WL 1834 (N.D. Iowa 1980)... 3
Landgraf v. USI Film Prods., 511 U.S. 244 (1994).. 8
Lewis-Ramsey v. The Evan. Lutheran Good Sam. Soc., 3:16-cv-26-RP-CFB (S.D. Iowa 2016).......... 11
Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007) 5, 14
MCI Telecomm. Corp. v. GTE NW., Inc., 41 F.Supp.2d 1157 (D. Or. 1999).................................... 8, 12
Miller v. United States, 294 U.S. 435 (1935) 9
Morgan v. Church's Fried Chicken, 829 F.2d 10 (6th Cir. 1987)... 3
Nat'l Min. Ass'n v. U.S. Army Corps of Eng., 145 F.3d 1399 (D.C. Cir. 1998) 5
Portlock v. Barnhart, 208 F.Supp.2d 451 (D. Del. 2002) 9
Rauch v. Day & Night Mfg. Corp., 576 F.2d 697 (6th Cir. 1978)... 3
Ridge at Red Hawk LLC v. Schneider, 493 F.3d 1174 (10th Cir. 2007) 2
Sanchez v. Caregivers Staffing Serv., 2017 WL 380912 (E.D. Va. 2017) 10, 13

Cases (Cont.)

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 8
Wash. Toxics Coalition v. U.S. Dep't of the Int., 457 F.Supp.2d 1158 (W.D. Wash. 2006) 6
Weng v. Wash. Univ., 480 S.W.3d 334 (Mo. App. 2015) 1
Westcott v. City of Omaha, 901 F.2d 1486 (8th Cir. 1990) 3
Wright v. Dir., Fed. Emergency Mgm. Agency, 913 F.2d 1566 (11th Cir. 1990) 6

Statutes

5 U.S.C. § 706(2)(A) 5
29 U.S.C. § 201 1
29 U.S.C. § 207 4
29 U.S.C. § 213 .... 1, 4
29 U.S.C. § 251 1
29 U.S.C. § 259 .... 7, 12
RSMo. § 290.500 1

Rules and Regulations

Fed. R. Civ. P. 8(a) 2
Fed. R. Civ. P. 12(b)(6) 2, 3
29 C.F.R. § 552 .... 1, 5
40 Fed. Reg. 7405 4
40 Fed. Reg. 7407 4
58 Fed. Reg. 69310–69312 5
60 Fed. Reg. 46798 5
66 Fed. Reg. 5481, 5485 5
67 Fed. Reg. 16668 5
78 Fed. Reg. 60557 5
79 Fed. Reg. 60974 14
80 Fed. Reg. 55029 .... 6, 7
80 Fed. Reg. 65646 .... 6, 7, 14

I. FACTUAL BACKGROUND AND ALLEGATIONS

Plaintiff purports to bring claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the Missouri Minimum Wage Law ("MMWL"), RSMo. § 290.500, *et seq.*,[1] on behalf of herself and all current or former personal care aides and advanced personal care aides employed by Integrity who were allegedly not paid overtime for all hours worked in excess of 40 hours per week from January 1, 2015 to November 12, 2015. *See* Doc. No. 23, ¶¶ 1, and 13. Plaintiff claims she and the other alleged class members provided companionship services to elderly persons and others who, because of illness, injury or disability, required assistance in caring for themselves, including providing respite, meal preparation, transportation, assistance with housework, arranging for medical care, and assistance with daily living activities. *See id.* at ¶¶ 1, 2, and 14.

Plaintiff claims that the job duties of personal care aides and advanced personal care aides constitute "companionship services" under 29 C.F.R 552.109(a) and 29 C.F.R. 552.6, and that the FLSA previously contained an exemption from overtime for "domestic workers" who provided companionship services. *See id.* at ¶ 16; *also see id.* at ¶ 25 (*citing* 29 U.S.C. §§ 213(b)(21) and 213(a)(15)). Plaintiff claims that beginning on January 1, 2015, it became the "Department of Labor's position that…domestic-service workers employed by third-party agencies or employers [were] not exempt from the FLSA's minimum wage and overtime requirements" under the companionship exemption. *See id.* at 26, 27, 31, and 33. Plaintiff alleges that she and others were not compensated in accordance with the FLSA as they were not paid overtime from January 1, 2015 to November 12, 2015. *See id.* at ¶¶ 18, 19, 22, and 28.

[1] Plaintiff's claims must also be dismissed under the MMWL. RSMo. § 290.505(3) provides that Missouri overtime requirements shall not apply to employees who are exempt from federal overtime requirements. *Also see Weng v. Wash. Univ.*, 480 S.W.3d 334, 337 (Mo. App. 2015). The overtime provisions of the MMWL expressly state that they shall be interpreted in accordance with the FLSA, 29 U.S.C. § 201, *et seq.*, and the Portal to Portal Act, 29 U.S.C. § 251, *et seq.*

II. STANDARD WHEN RULING ON A RULE 12(b)(6) MOTION TO DISMISS

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint consist of "a short and plain statement of the claim showing that the pleader is entitled to relief." A court may dismiss a complaint for failure to state a claim upon which relief can be granted. FED.R.CIV.P. 12(b)(6). A complaint only survives a Rule 12(b)(6) motion if it "contains[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,…a plaintiff's obligation to provide the 'grounds' of h[er] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (abandoning the "no set of facts" language of *Conley v.* Gibson, 355 U.S. 41 (1957) for the "plausibility" standard) (citations omitted).

Evaluating a Rule 12(b)(6) motion is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, supra*, 556 U.S. at 679. "[T]he mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims. *Ridge at Red Hawk LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original). The Court, "therefore, is not required to divine the litigant's intent and create claims that are not clearly raised, and it need not conjure up unpled allegations to save a complaint." *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal, supra*, 556 U.S. at 679 (*quoting* Fed.R.Civ.P. 8(a)(2)).

Thus, while the Court must accept as true plaintiff's factual allegations and draw all reasonable inferences therefrom, the "Court need not accept as true legal conclusions or unwarranted factual inferences." *Erickson v. Horing*, 2001 WL 1640142, *5 (D. Minn. 2001) (*citing Westcott v. City of Omaha*, 901 F.2d 1486 (8th Cir. 1990), and *Morgan v. Church's Fried Chicken*, 829 F.2d 10 (6th Cir. 1987)). A complaint must be dismissed when, as here, it is "clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made…or where the complaint's relevant allegations are little more than conclusions and opinions unsupported by law." *See Kinzenbaw v. Deere & Co.*, 1980 WL 1834, *1 (N.D. Iowa 1980) (*quoting, e.g., Coopersmith v. Supreme Court, State of Colorado*, 465 F. 2d 993, 994 (10th Cir. 1972)). When the "allegations on the face of the complaint show 'some insuperable bar to relief,'" the complaint must be dismissed, and "[o]ne such bar is an absence of law to support the claim(s)." *See Assoc. Indem. Corp v. Small*, 2007 WL 844773, *1 (W.D. Mo. 2007) (citations omitted). Simply stated, dismissal is appropriate here as the Amended Complaint is without merit due to an absence of law to support a valid claim. Plaintiff was exempt from overtime during all times relevant to her claims. *See, e.g., Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 702 (6th Cir. 1978) (noting the prevailing rule is that a complaint showing on its face that relief is barred by an affirmative defense is properly subject to a 12(b)(6) motion to dismiss).

III. ARGUMENT

Even accepting her allegations as true, plaintiff's Amended Complaint is without merit. There is no law to support her claims for overtime wages as plaintiff was an exempt companionship services employee during all times that Integrity did not pay her overtime wages (i.e. January 1, 2015 through November 12, 2015), and she was thereby exempted from the overtime provisions of the FLSA.

A. Plaintiff was an exempt employee under the companionship services exemption.

In 1974, the FLSA was amended to include "domestic service" employees not previously subject to its requirements (*see* FLSA 1974 Amendments, §§ 7(b)(1), (2), 88 Stat. 62), and at the same time, an exemption was created that excluded from FLSA coverage subsets of employees "employed in domestic service employment" (*see* § 7(b)(3), 88 Stat. 62 (codified at 29 U.S.C. § 213(a)(15))). Thus, although the FLSA requires employers to pay overtime compensation, *see* 29 U.S.C. § 207, it exempts "any employee employed in *domestic service employment* to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by *regulations of the Secretary* [of Labor])." *Id.* at § 213(a)(15) (emphasis added).

In response to the 1974 legislative change, the Secretary of Labor (hereinafter the "DOL") promulgated a set of regulations that includes the regulations at issue here. The first defines the statutory phrase "domestic service employment" as

> services of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed*. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

40 Fed. Reg. 7405 (1975) (emphasis added) (codified at 29 C.F.R. § 552.3).

The second regulation specifically addresses third-party employment and provides that exempt companionship employees include those

> who are employed by an employer or agency other than the family or household using their services…[regardless of whether] such an employee [is assigned] to more than one household or family in the same workweek.

40 Fed. Reg. 7407 (1975) (codified at 29 C.F.R. § 552.109(a)). The second regulation is commonly known as the "third-party regulation." As discussed, the third-party regulation remained in full and force and effective, uninterrupted, through at a minimum November 12, 2015. Integrity, as a third-party employer, acted in full compliance with the uninterrupted regulation, which allowed for unfettered continuation of the companionship services exemption under 29 U.S.C. § 213(a)(15) until at least November 12, 2015.

B. The third-party regulation and companionship exemption withstood, without interruption, all challenges presented by the DOL and private parties through, at a minimum, November 12, 2015.

Although the DOL considered changing the third-party regulation as early as 1993 by narrowing the companionship exemption (*see* 58 Fed. Reg. 69310–69312 (1993); 60 Fed. Reg. 46798 (1995); and 66 Fed. Reg. 5481, 5485 (2001)), the DOL did not make the change (*see* 67 Fed. Reg. 16668 (2002) ("[W]ithdrawing…proposed rule, published on January 19, 2001…pertaining to the…exemption for individuals who provide companionship services)). In 2007, the Supreme Court too rejected a challenge by a domestic worker to the third-party exemption. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (holding "third-party regulation is *valid and binding*") (emphasis added). It was not until 2013 that the DOL issued the new regulations at issue here, originally scheduled to go into effect on January 1, 2015, wherein the DOL set forth language that would later alter the companionship exemption to exclude caregivers employed by third party employers. 78 Fed. Reg. 60557 (Oct. 1, 2013).

Although the new regulations were scheduled to take effect on January 1, 2015, on December 22, 2014, prior to the regulations taking effect, the U.S. District Court for the District of Columbia vacated the new regulations which would have ended the companionship exemption for third-party employers. *Home Care Ass'n of Am. v. Weil*, 76 F.Supp.3d 138, 148 (D.D.C. 2014) ("Third Party Employer regulation, promulgated in 78 Fed. Reg. 60,557 and to be codified at 29 C.F.R. § 552.109, is hereby VACATED."). The district court issued the vacatur pursuant to its authority under 5 U.S.C. § 706(2)(A) of the Administrative Procedures Act, which states that the court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Because the district court vacated the new regulations prior to their effective date, as opposed to issuing an order enjoining enforcement of the new regulations against the parties in *Weil* exclusively, the vacatur had nationwide effect. *See, e.g.*, *Jordan v. Pugh*, 2007 WL 2908931, *4 (D. Colo. 2007) ("When a court determines that a regulation is facially invalid, it is proper to enjoin all application and enforcement of the regulation"); *Wash. Toxics Coalition v. U.S. Dep't of the Int.*, 457 F.Supp.2d 1158, 1163 (W.D. Wash. 2006) (enjoining agencies from implementation on a nationwide basis); and *Citizens for Better Forestry. v. USDA*, 2007 WL 1970096, *19 (N.D. Cal. 2007) (issuing nationwide injunction against implementation of planning regulations apart from specific application to project). Thus, Integrity was not required to be a party in *Weil* in order to be subject to the vacatur. *See Nat'l Min. Ass'n v. U.S. Army Corps of Eng.*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (under APA, a plaintiff "may obtain programmatic relief that affects the rights of parties not before the court.").

Given the vacatur rendered the new regulations void before the regulations were to be effective, Integrity was required to continue to abide by the "rules [or regulations] previously in force." *See, e.g.*, *Action on Smoking and Hlth. v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (defining "vacate" to mean "to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside."). Thereafter, Integrity continued to comply with the regulations that were in effect, most notably regulations that were in effect, uninterrupted, for more than 40 years prior.

The D.C. Court of Appeals did not overturn the district court's opinion until August 21, 2015. *See Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015). Thus, the new regulations only became effective prospectively after the date the D.C. Court of Appeals issued its mandate and the DOL began enforcement. *See, e.g., De Vegvar v. Gillilland*, 228 F.2d 640, 642-43 (D.C. Cir. 1955); *also see Wright v. Dir., Fed. Em. Mgt. Agency,* 913 F.2d 1566 (11th Cir. 1990) (holding postponement of the effective date of a regulation is generally considered to be evidence of prospective application). On September 14, 2015, the DOL announced by written rule that it would not bring enforcement actions for 30 days after the date of the mandate. *See* Application of the FLSA to Domestic Service;

Announcement of 30-Day Period of Non-Enforcement, A Rule by the Wage and Hour Division, 80 Fed. Reg. 55029 (Sept. 14, 2015). The mandate was issued on October 13, 2015, and the DOL confirmed by written rule that it was delaying enforcement until November 12, 2015. *See* Application of the FLSA to Domestic Service: Dates of Previously Announced 30-Day Period of Non-Enforcement, A Rule by the Wage and Hour Division, 80 Fed. Reg. 65646 (Oct. 27, 2015).

C. Integrity's pay practices were always in full compliance with the FLSA and the DOL's written rules.

At no time were Integrity's pay practices in violation of the FLSA. Integrity always acted in full compliance with the law, and in fact, Integrity payed close attention to and was highly conscious of the status of the law and the DOL's rules on the issue. When the rules of law did in fact change (i.e. when the new regulations became effective), Integrity began full compliance and began paying overtime to its companionship workers, including plaintiff. In so doing, Integrity relied in good faith upon the *Weil* decision and the written rules issued by the DOL on September 14, 2015 and October 27, 2015, which each announced the 30-day period of non-enforcement (*See*, *supra*, 80 Fed. Reg. 55029 and 65646). Accordingly, Integrity timely began paying overtime on November 12, 2015. Integrity's right to conform with the DOL's written rules is expressly contemplated by statute. 29 U.S.C. § 259 sets forth an employer's ability to conform with and rely on administrative rulings. Specifically, 29 U.S.C. § 259 states in pertinent part, "[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay...overtime compensation...if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation..." Integrity began payment of overtime on November 12, 2015 based upon its good faith conformance with and reliance on the DOL's written rules and its continued efforts to conform with the changing regulations. There is no basis in the law for plaintiff's claims.

D. The new regulations cannot be given retroactive effect.

Plaintiff's claims are based on the erroneous assumption that since January 1, 2015, the new regulations provide that companionship workers employed by third parties are not exempt. For this to be true, the new regulations would have to be given retroactive effect in cases between private parties. However, private rights and public enforcement under the FLSA should be the same. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Retroactive application of a vacated regulation that was never previously in effect would unbalance these rights. It would also violate the presumption against retroactive regulations as articulated by the Supreme Court in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). There is nothing here to suggest that the reversal of the district court's vacatur was to have retroactive effect. *Also see Landgraf v. USI Film Prods*., 511 U.S. 244 (1994) (holding provisions adding additional statutory damages not retroactive to cases pending on appeal when statute was enacted).

For plaintiff's claims to be viable, this Court would have to treat the vacatur "as if [it] had never occurred and the...regulations were continuously in effect." *MCI Telecomm. Corp. v. GTE NW., Inc*., 41 F.Supp.2d 1157, 1162 (D. Or. 1999). In *MCI*, the court refused to do so under very similar facts. In *MCI*, the FCC issued regulations that were challenged in an unrelated Eighth Circuit litigation. The Eighth Circuit stayed the regulations before they went into effect, and then vacated the regulations. The court found that the Eighth's Circuit's vacatur, before the regulations ever went into effect, meant the regulations were never in effect and there could be no liability for violations during the interim period of vacatur. *Id.* at 1160-65. In so doing, the *MCI* court noted that when a court interprets an existing law, the court's decision is given retroactive effect. The *MCI* court next noted that the regulations did not merely interpret existing law, but created new legal obligations. Thus, the MCI Court recognized "a crucial distinction between applying a new interpretation of a law that admittedly was in effect during the relevant time period, versus applying a substantive regulation that *never was in effect to begin with*." *MCI*, 41 F. Supp. 2d at 1163 (emphasis added). Although the Eighth Circuit was reversed on the merits, the MCI court recognized that "[r]eversal of the [stay and vacatur] orders on the merits d[id] not negate the fact that they were valid, effective orders," and moreover, "[a] stay would be a hazardous procedural device if liability could be premised upon violating a rule while it had been vacated or stayed." *Id.* at 1163; *also see, e.g., Bachynskyy v. Holder*, 668 F.3d 412 (7th Cir. 2011)(finding no retroactive application to grants before regulation's effective date); *In Re Keuler*, 399 B.R. 782 (M.D. Pa. 2009)(refusing retroactivity in case filed prior to provision's effective date); *Portlock v. Barnhart*, 208 F.Supp.2d 451 (D. Del. 2002)(refusing to apply regulation retroactively as it would attach legal consequences to events completed before enactment); and *cf. Durable Mfg. Co. v. U.S. DOL*, 578 F.3d 497 (7th Cir. 2009)(finding no impermissible retroactive effect as to certifications approved prior to regulation's effective date).

This reasoning is sound and makes it abundantly clear that the *Weil* court's valid decision to vacate the new regulations before effect rendered the regulations null and unenforceable and not retroactive. This sound reasoning is consistent with the Eighth Circuit's view on retroactivity. In *Criger v. Becton*, the Eighth Circuit adopted the reasoning in *Bowen*, *supra*, noting that *Bowen* "made it crystal clear that administrative regulations ordinarily are not to be given retroactive effect." 902 F.2d 1348, 1354 (8th Cir. 1990). The Eighth Circuit rejected the plaintiff's argument that regulations should be given retroactive effect to cover losses that occurred before the effective date of a new regulation, and in so doing, reasoned that a "*delayed effective date* on a regulation…is evidence that cuts against retroactive application." *Id.* at 1351 (emphasis added). The Eighth Circuit also relied on the holdings in *Bennett v. New Jersey*, 470 U.S. 632 (1985) (finding obligations should be determined by reference to the law in effect when the events occurred), and *Miller v. United States*, 294 U.S. 435 (1935) (finding regulation inapplicable as there was "nothing to suggest that it was to be given retrospective effect"). *See Criger*, at 1354-1355.

Numerous courts have applied this sound reasoning to the new regulations at issue here, finding that the regulations should not be given retroactive effect. In *Bangoy v. Total Homecare Soln., LLC*¸ 2015 WL 12672727 (S.D. Ohio 2015),[2] the court rejected retroactive liability, stating

> Any other conclusion would put [the employer], and other similarly-situated employers, in an untenable position. [The employer] could have complied with the vacated rule at the risk of paying [p]laintiffs overtime wages to which they were not entitled if the Court of Appeals affirmed the district court's judgment. Or, [the employer] could have done what it did here, rely on the vacatur of the rule but then, according to [p]laintiffs, be liable to them for FLSA damages if the Court of Appeals reversed the district court's judgment."

Id. at *3.

Another court, in a very recent opinion, too rejected a plaintiff's claim that she was entitled to overtime during the period of the vacatur. In *Sanchez v. Caregivers Staffing Serv.*, 2017 WL 380912 (E.D. Va. January 26, 2017), the plaintiff argued that *Weil* should be given "full retroactive effect, making the new regulations valid as of January 1, 2015." Rejecting the plaintiff's argument, the court stated, "This argument is unpersuasive because the DOL rule was a legal nullity during the time-frame for which Plaintiff seeks overtime pay…[I]f the rule was given full retroactive effect, it would unfairly force employers to pay overtime compensation for hours worked when overtime pay for companionship services was not required from employers nor expected by employees." *Id.* at *3; *also*

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[2] The Southern District of Ohio's later decision in *Dillow v. Home Care Network*¸ 2017 WL 749196 (S.D. Ohio Feb. 27, 2017), will be addressed on pages 11-13, *infra*. *Dillow* appears to disagree with *Bangoy* based on the lack of authority for the plaintiff's position at the time *Bangoy* was decided, and based on the lack of analysis of *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). *See id.* at *3. *Harper* is not relevant. *See, infra*, n. 3. In addition, and as the *Dillow* court notes, a federal district court opinion is not binding precedent. *See id.* at *4 (*citing Camreta v. Green*, 563 U.S. 692 (2011)). Thus, the *Dillow* court's decision to side with the flawed decisions following *Bangoy* should similarly not serve to impact this Court's decision in this matter. This Court is not required to follow district court opinions that it finds not instructive or well-reasoned.

see Alves v. Affiliated Home Care¸ 2017 WL 511836 (S.D. N.Y. 2017) ("The Rule was intended to go into effect January 1, 2015" but "became effective October 13, 2015"); and *Flamer v. Maxim Hlthcare. Serv., Inc.*, 2015 WL 12762067, *1 (D. Md. 2015) (granting motion to strike on October 26, 2015, as new regulations could not have become effective January 1, 2015).

The *Bangoy* court also recognized that an employer has a right to rely on the DOL's position regarding when the DOL will bring enforcement actions. In further discussing the effective date of the new regulations, the court stated: "[T]he fact that the DOL has indicated that it will not bring enforcement actions for violations that occurred before the Court of Appeals reinstated the rule…strongly suggests that the rule should not be given retroactive effect in cases between private parties. Indeed, '[g]ood administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.'" *Bangoy*, 2015 WL 12672727, *3; *cf.*, *inter alia*, *Kinkead v. Humana, Inc.*, 2016 WL 3950737 (D. Conn. 2016) (failing to address the effect of a court's vacatur prior to regulations going into effect); *Lewis-Ramsey v. The Evangelical Lutheran Good Samaritan Society*, Case No. 3:16-cv-26-RP-CFB (S.D. Iowa 2016) (acknowledging the split in the district courts and relying on *Kinkead*); and *Cummings v. Bost*, 2016 WL 6514103 (W.D. Ark. 2016) (relying on *Kinkead* without explanation and without analysis of regulations being voided prior to effect).

Here, the Court should follow sound Eighth Circuit precedent, as well as the reasoning in *Bangoy*, *Sanchez*, *Alves*, and *Flamer*, and not apply the new regulations retroactively. Integrity recognizes that these decisions are in the minority. The majority opinions, however, are disregarding a very basic and fundamental premise: Only if the new regulations are ruled to be valid in the first instance, can there be a question of effect, and this can only be applied prospectively as the new regulations never existed before. Simply stated, without a starting point, there can be no place to return to. This premise is being ignored by the majority opinions. For example, in *Dillow*, the court found

Weil to "h[o]ld that the regulations in question that *had already been issued* were valid and enforceable." *Dillow*¸ *supra* at n. 1, 2017 WL 749196 at *3 (emphasis added). The analysis should not focus on whether the new regulations are valid and enforceable, but when were they valid and enforceable. An agency's *issuance date* is not the date of effect. If this were true, the new regulations would have been effective in 2013 when issued.

The *Dillow* court also erroneously claimed that *Bangoy* failed to consider *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993),[3] and further claimed there was no authority for the proposition that the DOL's enforcement decisions are binding. However, federal statutes expressly state this to be true, particularly in the context of overtime compensation. "[N]o employer *shall* be subject to any liability…[for] overtime compensation...if he pleads and proves that the act…was in good faith in conformity with and in reliance on any written administrative regulation." *See* 29 U.S.C. § 259 (emphasis added); *also see* Section III.C, *supra*. Integrity rightfully, in good faith, conformed with and relied on the DOL's written rules delaying enforcement. Thus, federal law expressly prohibits Integrity from being found liable as a result, authority the *Dillow* court was not asked to consider.

The *Dillow* court and others have also impermissibly viewed this matter as requiring the employer to make bold assumptions about what the law may become, based on conjecture and guess, and they also infer that it would be inequitable for the employer to do anything other than err on the side of paying wages not legally owed, nor certain to ever be legally owed. For example, *Dillow* stated

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[3] In *Harper*, the Supreme Court held that when the Court decides a case and applies a new legal rule to the parties before it, the Court and other courts must treat the newly announced legal rule as "retroactive," applying it to all pending cases, regardless of whether those cases involve pre-decision events. *MCI*, *supra*, is significant as the court correctly distinguished *Harper*, noting that in *Harper*, the Supreme Court only decided a facial challenge to the regulations and did not apply those regulations to a particular agreement, and therefore, *Harper* was of no relevance (*See*, *MCI*¸ *supra*, 41 F.Supp.2d at 1164 ("[A] prerequisite to application of the *Harper* retroactivity rule is that the case announcing the new rule has itself applied that rule to the litigants in that case."). The same is true here. *Weil* only decided that the regulations were valid, and did not apply the regulations to any particular employer in that case. Therefore, a retroactivity analysis is not required or appropriate.

> It is disingenuous to suggest that Defendant…could not anticipate that there was a significant *possibility* the…decision in *Weil* would be overturned on appeal…The Court sees greater inequity in suggesting that an early victory in court could shield a defendant from any obligation for the length of the appellate process, even if that victory was based on a *flawed understanding of the law at issue*.[4] That holding would…create a perverse incentive for a party that has won…an early victory to drag out the appeals process…Even were a defendant to ultimately lose its appeal, it could save a considerable amount of money based on how many total hours of overtime it avoided paying through its delay tactics. The more equitable holding is that any party involved in ongoing litigation should be prepared to be responsible for the implications of a retroactive ruling not in its favor at the appellate level.

Id. at * 4. There are multiple errors inherent in this reasoning. This is not a case where a judgment or order was entered against a provider whereby Integrity may have anticipated a later negative effect. This is also not a case where Integrity had a flawed understanding of the law. Integrity fully complied with the law in effect, and proactively complied with the law when it changed. There is also nothing equitable about effectively forcing an employer to pay for wages that may never be owed, or else face civil penalties. Such a practice may also very well end in an inequitable result for the employee, particularly if the employer paid wages, though not legally required or expected, and later discontinued such practice when confirmed to be not legally required. *See Sanchez*, *supra*, 2017 WL 380912 at * 3 (stating if new regulations were given retroactive effect, it would unfairly force employers to pay overtime compensation when overtime pay was not required *nor expected by employees*) (emphasis added).

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[4] This error in reasoning was consistent throughout the *Dillow* opinion. Notably, the court ironically claimed, “The fairness principle at issue should be obvious – a party who relies upon the wrong interpretation of the law should not be rewarded over a party who relies upon the correct interpretation.” It is nonsensical to think that Integrity should comply with what they believe the law may become, rather than what the law is in fact. Under the majority’s logic, employers should ignore the law in place and take action on possibilities, and make substantial changes in likely their largest budgetary line item, compensation, based on uncertainties.

Moreover, to follow the courts in *Lewis-Ramsey*, *Kinkead*, *Bost*, and others would disregard the D.C. Circuit's express statement in *Weil* when reversing the district court that employers "*could make use* of the companionship-services exemption" in light of the vacatur. *See Weil*, 799 F.3d at 1090 (emphasis added). It would also disregard the Supreme Court's opinion that the third-party exemption was "valid and binding." *See Coke*, *supra*, 551 U.S. at 158. It would also most certainly place Integrity and innumerable other employers in an indefensible position of paying wages at the time, although not legally required, under a rule that had never been in effect, and was uncertain of ever being in effect. If a new regulation does not go into effect, an employer should have a right to rely on its nonexistence. Finding otherwise would require employers to change pay practices based on a mere guess as to what the law may become. Such a finding would also be unfair to the employees who may start receiving overtime pay, based on a possibility, only to find out later that pay practices reverted to those in effect when the companionship exemption was available, because the law was ruled to have never changed.

E. Dismissal is required as the Amended Complaint is without merit due to an absence of law to support a valid claim.

Integrity had a right to conform with Weil and the DOL's enforcement rules. Vacating a regulation before its effective date makes it a nullity and unenforceable. Permitting plaintiff's claims to survive for an alleged violation of the new regulations while a vacatur prevented their validity in the first instance, would give the rule an impermissible retroactive effect. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2000) (applying *Bowen* and *Landgraf* and refusing to apply provisions of the INA retroactively). This is supported by the fact that the DOL indicated that it would not bring enforcement actions for alleged violations prior to November 12, 2015, and with the exercise of prosecutorial discretion through December 31, 2015 (*see* 80 Fed. Reg. 65646 (Oct. 27, 2015) (*citing* 79 Fed. Reg. 60974 (Oct. 9, 2014)), thus adding strong support for the new regulations non-retroactivity.

Plaintiff's Amended Complaint must be dismissed. While plaintiff may claim that she was misclassified as exempt and owed overtime from January 1, 2015 through November 12, 2015, her claim fails as a matter of law. Plaintiff qualified under the companionship services exemption through at a minimum November 12, 2015, and she admits the same by her pleading. Integrity began paying plaintiff overtime wages as of November 12, 2015, in early compliance with the law, although a grace period of a month and one-half remained. Without a viable claim, plaintiff's Amended Complaint must be dismissed. To find otherwise, would unnecessarily and impermissibly subject Integrity to the weighty burdens of an unsubstantiated collective action.

IV. CONCLUSION

Plaintiff's counsel has targeted multiple homecare businesses throughout the nation regarding what they claim to be similar failures by homecare providers to pay overtime wages following *Weil*.[5] The sheer number of complaints verifies that the multitude of homecare providers were rightfully following what the law was at the time, not what the law may turn out to be. Integrity should not be penalized for doing the correct and right thing under the current law, nor should it be penalized for doing the right thing when the law changed. Integrity strives for compliance under the strict letter of the law; it does not operate on "what if's" and "maybe's". Forcing Integrity and other employers to guess as to what they should do in order to be compliant, will do nothing more than increase litigation. This is not the result intended by our laws. Integrity should not be forced to expend substantial legal fees and defend against an action that has no basis in the law. Plaintiff's Amended Complaint must be dismissed under FED.R.CIV.P. 12(b)(6).

[5] A rough estimate from the PACER docket indicates that plaintiff's *pro hac vice* counsel has filed at least 23 such actions, under boilerplate complaints, in the last several months. Notably, none of these actions were filed during the period of the vacatur clearly suggesting that any potential plaintiffs too understood that the rules did not change until after November 12, 2015, at the earliest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of March, 2017, I electronically filed the above and foregoing document using the Court's e-filing system which sent notification to the following:

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